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James R. Forbes (114863)
 Paul Stinson (233486)
 NIXON PEABODY LLP
 Two Embarcadero Center, Suite 2700
 San Francisco, CA 94111-3996
 Telephone: (415) 984-8200
 Facsimile: (415) 984-8300
 E-mail: jforbes@nixonpeabody.com
 E-mail: pstinsone@nixonpeabody.com

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Attorneys for Plaintiff,
 JAMES R. ODLE

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

JAMES R. ODLE,

Plaintiff,

vs.

DEPARTMENT OF JUSTICE; DEPARTMENT
 OF JUSTICE OFFICE OF PROFESSIONAL
 RESPONSIBILITY

Defendants.

No.

**COMPLAINT FOR INJUNCTIVE AND
 DECLARATORY RELIEF**

[Freedom of Information Act, 5 U.S.C. § 552 *et seq.*]

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), Title 5 U.S.C. § 552 *et seq.*, for injunctive and declaratory relief, seeking the release of agency records requested by Plaintiff JAMES RICHARD ODLE ("Plaintiff" or "Mr. Odle") from Defendants UNITED STATES DEPARTMENT OF JUSTICE ("DOJ") and UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY ("OPR").¹

¹ The request was made by John Grele, Mr. Odle's counsel, acting on Mr. Odle's behalf.

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2. Plaintiff James Richard Odle was convicted of murder and sentenced to death in 1983, currently resides on Death Row at the California State Prison at San Quentin. In 2001, the Ninth Circuit Court of Appeals held that the State's failure to provide a competency hearing at the time of Mr. Odle's 1983 trial violated his due process rights, and instructed the state court to determine whether a retrospective competency hearing would be possible. Despite the lack of records and contemporaneous reports regarding Mr. Odle's competency in 1983, the state court has decided that a retrospective hearing would be feasible, and set a trial date of September 16, 2005. The sole evidence relied upon by the court in making this determination was the testimony of Dr. Daniel A. Martell, a forensic psychologist. In 1997, Dr. Martell was accused of violating a court order in a federal capital case in New Mexico, was subsequently removed from numerous death penalty cases for which he had been contracted by the DOJ, and his actions in the case were reviewed by DOJ and referred to the OPR for investigation. The details and outcome of this investigation is of the utmost importance to Mr. Odle's due process rights because Dr. Martell was and is essentially the sole witness against him. The details of Dr. Martell's actions and the subsequent investigation are also important to the public as it needs to know how its government prosecutes capital defendants, *i.e.*, whether it used an expert witness lacking credibility and whether it is trying to protect convictions based on that testimony. If the government is protecting Dr. Martell, for whatever reason, the result is to allow Dr. Martell to testify, unchallenged, in other capital cases.

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3. Pursuant to 5 U.S.C. § 552 *et seq.*, Plaintiff twice requested in writing that the DOJ and OPR make available for inspection and copying all documents related to the investigation of Dr. Martell in connection with the New Mexico case. Plaintiff also requested expedited processing of these requests. In response, Defendants refused to confirm or deny the existence of such documents (a "Glomar" response), asserting Dr. Martell's privacy interests under 5 U.S.C. §§ 552(b)(6) and (b)(7)(C).

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4. Plaintiff appealed this denial, asserting that the Glomar response was inappropriate because, among other things: (1) the existence of the investigation and hence the documents behind it were already known, the DOJ had already released Dr. Martell's version of the events, and Dr.

1 Martell himself regularly testified in open court regarding the incident; (2) inquiries and
 2 investigations conducted by the OPR are not solely law enforcement endeavors, and are therefore not
 3 entitled to blanket protection under 5 U.S.C. § 552(b)(7); and (3) the advancement of the public's
 4 interest in governmental prosecutorial integrity and honesty outweighed any minimal privacy
 5 interests involved. Plaintiff also requested expedited processing of the appeal.

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 7 5. Defendants first denied and then granted expedited processing of the appeal, but again
 8 denied Plaintiff's request on the basis of Dr. Martell's privacy interests under 5 U.S.C. §§ 552(b)(6)
 9 and (b)(7)(C).

10 6. Having exhausted his administrative remedies, Plaintiff therefore seeks an injunction
 11 requiring the DOJ and OPR to comply with FOIA by releasing the requested information on an
 12 expedited basis.

13 JURISDICTION AND VENUE

14 7. This Court has jurisdiction over this action and personal jurisdiction over the parties
 15 pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1331. Venue lies in this
 16 district pursuant to 5 U.S.C. § 552(a)(4)(B). Venue is proper under Civil Local Rule 3-2(d), because
 17 a substantial part of the events which give rise to this claim occurred in Marin County, where
 18 Plaintiff resides and San Francisco, where Mr. Grele practices.

19 PARTIES

20 8. Plaintiff James Richard Odle, an individual, is a prisoner of the State of California,
 21 and resides at San Quentin State Prison, in Marin County, California.

22 9. Defendant United States Department of Justice is a Department of the Executive
 23 Branch of the United States. DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1).

24 10. Defendant Office of Professional Responsibility is an agency within the DOJ. The
 25 OPR is an agency within the meaning of 5 U.S.C. § 552(f)(1).

26 FACTS

27 I. HISTORY OF PLAINTIFF'S CASE

28 11. In 1983, Plaintiff James Richard Odle was tried, convicted and sentenced to death for

1 two first degree murders committed in 1980. The judgment was affirmed by the California Supreme
2 Court. *People v. Odle*, 45 Cal. 3d 386 (1988).

3 12. Ten years prior to his conviction and sentencing, Mr. Odle was involved in a serious
4 car accident which resulted in extensive brain trauma and necessitated removal of a 3 x 3 x 4 inch
5 section of his temporal lobe. *Id.* at 399. Subsequently, Mr. Odle's personality changed completely:
6 he began to exhibit bizarre, unpredictable, and often violent behavior, could no longer hold a job,
7 underwent a variety of unsuccessful medication regimes, was repeatedly hospitalized for significant
8 periods, and was clinically diagnosed with organic brain disorder. *Id.* at 399-401.

9 13. Despite this history and a number of warning signs of Mr. Odle's incompetence to
10 stand trial, no competency hearing was ever provided. In 2001, the Ninth Circuit Court of Appeals
11 determined that this omission violated Mr. Odle's due process rights, and instructed the state court to
12 determine whether a retrospective hearing would be feasible, and if feasible, whether Mr. Odle was
13 competent to stand trial in 1983. If not, then Mr. Odle's conviction would have to be reversed. *Odle*
14 *v. Woodford*, 238 F.3d 1084, 1089-90 (9th Cir. 2001).

15 14. Although relevant evidence from the time period in question was scanty, at best, the
16 state court determined that a retrospective competency hearing would be possible, and set a trial date
17 of September 16, 2005.

18 15. In making its determination of feasibility, the state court relied exclusively upon the
19 testimony and evaluation provided by Dr. Daniel A. Martell, a forensic psychologist.

20 16. In 1997, Dr. Martell was accused of violating a court order in the matter of *U.S.A. v.*
21 *Everett Edward Spivey*, Crim. No. 95-491 (D.N.M.) by speaking with prosecutors about his
22 evaluation of the defendant after being ordered not to talk to any of the parties. *See, e.g.,* Scott
23 Sandlin, *Tensions Rise In Pot Case*, ALBUQUERQUE J., Apr. 22, 1997, Scott Sandlin, *Deal Ends*
24 *Death-Penalty Case*, ALBUQUERQUE J., May 7, 1997, Federal Death Penalty Defense Newsletter, *The*
25 *Government's Mental Health Expert of Choice* (Jan., 1998). Dr. Martell was subsequently removed
26 from numerous death penalty cases for which he had been contracted by the DOJ, and his actions in
27 the case were reviewed by DOJ and referred to the OPR for investigation.
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17. The fair and accurate application of death penalty statutes has been and continues to be the subject of intense nationwide scrutiny. See, for example, the 2004 Death Penalty Articles Index compiled by the Death Penalty Information Center, which runs to 63 pages of articles on the subject from 2004 alone. Available at <http://www.deathpenaltyinfo.org/04Articles.pdf>.

II. HISTORY OF PLAINTIFF'S FOIA REQUESTS

18. On September 3, 2004, John Grele on Plaintiff's behalf, filed a written request with the OPR seeking "any and all documents, as defined by FOIA, related to the investigation of the government's potential witness, Daniel Martell, in the matter of [*Spivey*]."

19. On October 14, 2004, Plaintiff received a "Glomar" response from the OPR which stated that the Assistant Counsel had "decided to refuse to confirm or deny the existence of records responsive to your request. Lacking an individual's consent, an official acknowledgement of an investigation, or an overriding public interest, even to acknowledge the existence of investigatory records pertaining to an individual would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(6) and could reasonably be expected to constitute an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C)."

20. On March 7, 2005, Plaintiff filed another written request with the OPR seeking "any and all documents, as defined by FOIA, regarding the government's contractor, Daniel Martell, Ph.D., in the care and control of the [DOJ] and its [OPR] relating to Dr. Martell's actions and statements in the matter of [*Spivey*]." This request went into more detail regarding the *Spivey* incident and the DOJ's subsequent investigation, noted that the DOJ had already released Dr. Martell's statement regarding the incident, and attached two letters from the DOJ indicating the existence of the investigation, and the measures that had been taken in removing Dr. Martell from pending cases. It also:

- noted the considerable public interest in death penalty litigation and the concern for prosecutorial misconduct;
- outlined the role of Dr. Park Dietz (Dr. Martell's colleague and mentor) in the reversal of conviction in the *Yates* case;
- noted the considerable judicial resources that are expended every time Dr. Martell testifies and has to be questioned about the details of the *Spivey* incident;

- requested that, if any portion of the request was denied, that the OPR please provide all non-exempt portions which are reasonably segregable by redaction or segmentation;
- requested that any deleted portions be described in detail.

This request also stated that it was “urgent as it relates to a pending capital case in the Superior Court of the State of California where Dr. Martell is a prosecution witness. Please expedite this request as any delay is likely to cause a delay in these trial level proceedings.”

21. On March 20, 2005, Plaintiff received another Glomar response from the OPR, essentially identical to the October, 2004 response.

22. On April 6, 2005, Plaintiff submitted a written request for appeal of the OPR’s denial and Glomarization of his FOIA request, contending that the response was improper because, among other things: (1) the existence of the investigation and hence the documents behind it were already known, the DOJ had already released Dr. Martell’s version of the events, and Dr. Martell himself regularly testified in open court regarding the incident; (2) inquiries and investigations conducted by the OPR are not solely law enforcement endeavors, and are therefore not entitled to blanket protection under 5 U.S.C. § 552(b)(7); and (3) the advancement of the public’s interest in governmental prosecutorial integrity and honesty outweighed any minimal privacy interests involved. This request for an appeal again stated that it concerned “an on-going use of a witness in death penalty prosecutions that are presently occurring and for which trial dates are imminent,” and requested “expedited consideration of this appeal as well.”

23. On April 13, 2005, Plaintiff received from OPR an acknowledgement of the receipt of the appeal and denial of expedited processing.

24. On May 23, 2005, Plaintiff submitted another written request for expedited processing of his appeal, this time setting forth in detail the reasons why his request was entitled to expedited processing under 28 C.F.R. § 16.5(d)(iii), (iv) and 5 U.S.C. § 552(a)(6)(E)(i)(II).

25. On May 26, 2005, Plaintiff received OPR’s grant of this request.

26. On June 3, 2005, Plaintiff received a denial of his appeal from the DOJ’s Office of Information and Privacy. This denial affirmed the OPR’s Glomar response and refusal, pursuant to 5 U.S.C. §§ 552(b)(6) and (b)(7)(c), to confirm or deny the existence of any records pertaining to Dr.

1 Martell.

2 **REQUISITES FOR RELIEF**

3 27. Plaintiff has exhausted his administrative remedies.

4 28. An actual controversy exists: Plaintiff submits that Defendants' failure to release the
5 requested records violates federal law. Plaintiff is informed and believes that Defendants contend
6 that their failure to do so is consistent with federal law.

7 29. Plaintiff is suffering irreparable harm. Absent relief from this court, Plaintiff will face
8 a retrospective competency hearing—a hearing which is being allowed to proceed solely on the basis
9 of Dr. Martell's testimony—without having access to crucial information concerning Dr. Martell's
10 competence and integrity. Plaintiff's due process rights are thus directly implicated by the OPR's
11 continued refusal to produce the requested records.

12 30. Moreover, Dr. Martell continues to testify in other death penalty cases while the facts
13 behind his involvement in the *Spivey* case and his subsequent investigation by the DOJ and the OPR
14 remain obscured from public scrutiny. The public has an overriding interest in knowing how its
15 government prosecutes capital cases, i.e., whether it uses expert witnesses of dubious credibility and
16 whether it seeks to protect convictions which are in part based on the testimony of expert witnesses
17 who have violated a court order and who have misrepresented the facts concerning the violation of a
18 court order.

19 31. Plaintiff presently has no adequate remedy at law to address his rights.

20 **FIRST CLAIM FOR RELIEF**

21 32. Defendant's failure to grant Plaintiff's request for release of information directed to
22 the DOJ and OPR violates the FOIA, 5 U.S.C. §§ 552(a)(3), (b), and (d).

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff prays:

- 25 1. For preliminary and permanent injunctive relief requiring Defendants to disclose the
26 requested records and make copies available to Plaintiff;
27 2. For a declaratory judgment;
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3. For expeditious proceedings in this action;
4. That the Court reserve jurisdiction to ensure that the Defendants timely comply with its orders;
5. That the Court award Plaintiff his costs and reasonable attorney's fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. For such other relief that the Court deems just and proper.

DATED: July 1, 2005

Respectfully submitted,

NIXON PEABODY LLP

By:


James R. Forbes
Attorneys for Plaintiff
JAMES RICHARD ODLE